Supreme Court, U.S.
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NO._____

OFFICE OF THE CLERK

THE SUPREME COURT OF THE UNITED STATES

October, 1994 Term

CURTIS LEO ZIESER, et. al.,

APPELLANTS,

vs.

FARMERS HOME ADMINISTRATION, et al.,

APPELLEES

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. If, upon judicial review, the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, if remand to the agency for additional investigation or explanation would not be appropriate or feasible under the circumstances, and if the agency decision-makers were required by regulation to fully document reasons for their decision but failed to do so, what is the proper course for the court to follow?

2. If an agency fails to make a contemporaneous record documenting the reasons for its decision, as required by its own regulations, under what circumstances is the agency's failure to observe procedure required by law prejudicial within the meaning of Section 706(2)(D) of the Administrative Procedure Act, requiring the reviewing court to set aside the agency action so taken?

COMPLETE LIST OF PARTIES

APPELLANTS:

Curtis Leo Zieser,
David Charles Zieser.

APPELLEES:

Farmers Home Administration,

Richard Lyng, Secretary of the United States Department of Agriculture

Vance Clark, Administrator of the Farmers Home Administration,

Robert R. Pim, State Director of the Farmers Home Administration

Gail Ives, District Director of the Farmers Home Administration,

Lonnie J. Janachek, Buchanan County Supervisor of the Farmers Home Administration,

Robert J. Morony, Chairperson of the FmHA Buchanan County Committee,

Carroll Bantz, Member of the FmHA Buchanan County Committee,

Melvin Hall, Member of the FmHA Buchanan County Committee,

Mark Boddicker,

Pamela Boddicker,

United States of America.

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OPINIONS DELIVERED BY OTHER COURTS AND ADMINISTRATIVE AGENCIES

FmHA Buchanan County Committee FmHA Form 440-2 for Mark Boddicker--dated August 26, 1987.

Report and Recommendation of United States Magistrate Mark W. Bennett--Filed March 31, 1993.

United States District Court of the Northern District of Iowa--Filed September 2, 1993.

United States Court of Appeals for the Eighth Circuit--Filed June 21, 1994. (UNPUBLISHED)

GROUNDS FOR JURISDICTION OF THIS COURT

The Appellants seek review of the decision of the Court of Appeals for the Eighth Circuit filed on June 21, 1994.

The jurisdiction of the United States District Court for the Northern District of Iowa is federal question jurisdiction pursuant to 28 USC Section 1331 and pursuant to 5 USC Section 702 et. seq. of the Administrative Procedure Act, and 28 USC Section 1361, relating to mandamus.

The jurisdiction of this Court is pursuant to 28 USC Section 1254(1) as this is a Petition for Writ of Certiorari from the decision of the Court of Appeals for the Eighth Circuit.

TEXT OF STATUTES AND REGULATION

5 USC Section 702

5 USC Section 703

5 USC Section 704

5 USC Section 705

5 USC Section 706

7 USC Section 1985(e)(1987)

28 USC Section 1331

28 USC Section 1361

7 CFR 1955.106

The full text of these statutes and regulations appears in the appendix filed with this petition.

STATEMENT OF THE CASE

FmHA acquired the Zieser inventory farm from Charles and Marjorie Zieser, parents of Plaintiffs, in early 1987.

When FmHA advertised the Zieser inventory farm for sale in November of 1987, eleven applications were received, including one from Appellees Mark and Pamela Boddicker (Boddickers) and one from Appellants David and Curtis Zieser (Ziesers).

On December 23, 1987, FmHA issued written notice to Boddickers that they had been selected for the purchase of the Zieser Inventory Farm, and entered into a real estate contract to sell the farm to Boddickers. On the same date, FmHA issued written notice to Ziesers stating that they had been found eligible, but had not been selected for the purchase of the farm.

Ziesers protested the decision to FmHA, complaining, among other things, that an error had been made by FmHA in calculating their "loan risk index" used in the selection process. FmHA agreed to review the decision based on a recalculation of the "loan risk index" to show Ziesers with a perfect score, but on February 17, 1988, Ziesers were notified that the decision remained unchanged.

In making the selection the FmHA County Committee failed to "fully document" the reasons for its decision on the Form FmHA 440-2 of the selected applicant, as required by FmHA regulation. Form 440-2 is designed to be signed by the Committee members contemporaneously with their decision. The Boddicker Form 440-2 was signed and dated 8-26-87 and contained no reasons for Boddickers' selection for the Zieser inventory farm.[1]

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[1] Photocopies of this document are not contained in the appendix, but have been lodged with the Clerk of the Supreme Court of the United States. The original FmHA Form 440-2 referred to in this footnote is in the office of the Clerk of Court for the Northern District of Iowa.

On March 8, 1988 FmHA conveyed the Zieser inventory farm to Boddickers pursuant to the real estate contract, which called for the sale to be by quit claim deed and to be subject to FmHA regulations. Boddickers had access to their own FmHA file and therefore, at the time of closing, had constructive notice concerning FmHA's failure to comply with regulatory requirements, including the failure of the County Committee to fully document reasons for its decision on a Form 440-2 signed by the Committee Members contemporaneously with its decision.

Ziesers began this case by filing a Complaint in the United States District Court for the Northern District of Iowa on April 19, 1988, requesting judicial review of action taken by the FmHA Buchanan County Committee in conveying the Zieser inventory farm to Boddickers, pursuant to 5 U.S.C. Sec. 706(2)(A). The Ziesers complained that FmHA had acted arbitrarily and capriciously and had followed improper law and procedures in

awarding the farm to Boddickers. The Ziesers also requested preliminary and permanent injunctive relief, pursuant to 28 U.S.C Sec. 1361, praying the District Court to set aside the sale of the Zieser inventory farm to enable the Ziesers a fair opportunity to apply to purchase the farm.

On April 25, 1988 and on April 27, 1988, a hearing on the application for preliminary injunction was held before the Honorable John Jarvey, Federal Magistrate Judge.

At that hearing, the Boddicker 440-2, and other original documents were subpoenaed from FmHA, and FmHA's failure to comply with 7 C.F.R. Section 1955.106(d)(2) (1-1-87 edition) finally came to light. The Boddicker 440-2 was dated August 26, 1987, two months prior to the date the Zieser farm was advertised for sale, and had stated "Eligible - Selected for Farm 180 Ac (Formerly Charles Zieser)" before being defaced with white-out by FmHA to read simply "Eligible - Farm". It contained no explanation of the decision whatsoever, and contained no

indication that FmHA had considered factors set out in Section 1955.106(d)(2) as required by that regulation.

Nor did the County Committee members contemporaneously sign and date any other record documenting reasons for their decision. Nor did any other contemporaneous record kept by other FmHA officials, such as the minutes of the December 23, 1987 meeting or the Boddicker running record, give contemporaneous reasons for the County Committee's selection of Boddickers.

Due to the lack of a record to review, Judge Jarvey allowed Ziesers to question FmHA officials about the reasons for these irregularities, to probe for evidence of agency bias, and to question FmHA as to the basis for the decision in favor of Boddicker. In his Recommendation to Judge Hansen, Judge Jarvey commented on the lack of record for review, and also stated his opinion that Ziesers would ultimately prevail on the merits, but did not recommend a preliminary injunction.

On May 4, 1989, the Honorable David R. Hansen, United States District Court Judge for the Northern District of Iowa, entered an order denying Ziesers' application for writ of preliminary injunction.

On September 18, 1992, Ziesers moved to amend their petition to add an allegation, pursuant to 5 U.S.C. 706(2)(D), that the "FmHA action was ... without observance of procedure required by law because ... the administrative record shows that the Committee failed to fully document reasons explaining its selection on the Boddicker Form FmHA 440-2 and failed to consider the factors it is required to consider, contrary to 7 C.F.R. Section 1955.106(d)(2) (1-1-87 edition.)" On October 2, 1992, Zieser's motion to amend was approved.

On November 24th and 25th, 1992, an evidentiary hearing was held before Federal Magistrate Judge Mark Bennett, sitting in the Northern District of Iowa by designation. For use at this judicial review hearing, FmHA produced Exhibit "B" as the administrative

record for FmHA concerning the decision to award the Zieser farm to Boddickers. Exhibit "B" included a "Running Record" for Mark Boddicker; Minutes of a Buchanan County FmHA committee meetings of December 23, 1987, and February 17, 1988; and other materials kept by FmHA Supervisor Janechek and his assistant. The only record kept and signed by the Buchanan FmHA County Committee is the Form 440-2, but it was not included by FmHA in its Exhibit "B".

Irregularities also existed in Exhibit "B", including a spoliation which occurred when FmHA admitted that it added the words "sharp individual" to the Boddicker running record for December 23, 1987, after the April 27, 1988 hearing on temporary injunction. After the April 27, 1988 hearing, FmHA also re-dated a portion of the Boddicker running record to make it appear as if FmHA had made financial calculations concerning the Boddicker operation on December 23, 1987, when in fact the calculations had been made in connection with Boddicker's application for a farm for which

Boddicker had been rejected on August 26, 1987. These spoliations came to light when FmHA Exhibit "B" was compared with versions of the same documents produced by FmHA at the hearing on the temporary injunction over four years earlier. In fact, FmHA admitted that it had not met with Boddicker on December 23, 1987.

Again, Ziesers were allowed to question FmHA officials in order to uncover these spoliations, to probe for evidence of other agency spoliation or bias, and to ask for explanation of matters contained in FmHA Exhibit "B".

The Ziesers timely objected when, on cross-examination, these same FmHA officials and former FmHA County Committee members testified as to reasons for their decision, giving reasons which had not been set forth in the agency record. The FmHA testimony included statements of reasons former FmHA County Committee members claimed they had in mind when they voted to select Boddickers over Ziesers.

During the period between December 23, 1987 and the November, 1992 hearing, the terms of the Buchanan County Committee members who had made the original decision expired, and additionally, new regulations were enacted by FmHA eliminating the exercise of discretion by the FmHA County Committee in connection with the sale of inventory farms, in favor of a procedure in which eligible applicants would be grouped by preference categories, and if two or more applicants are in the same preference category, the applicant is chosen by lot. Under the new scheme, for example, beginning farmers are preferred. On March 31, 1993, Magistrate Judge Bennett entered his report and recommendation recommending that the matter be remanded to FmHA, due to the administrative record being inadequate for review.

On September 2, 1993, United States District Judge Charles R. Wolle entered an order terminating the case and ruling that the case should not be remanded for further development of an administrative record and

dismissed Ziesers' complaint with prejudice at Ziesers' costs. The District Court found that the FmHA Buchanan County Committee "did not properly make an administrative record at the time documenting their reasons" for the selection of Boddickers, and that, after the decision was made, that the FmHA Supervisor "did incorrectly alter part of" what was presented by FmHA in the District Court as the administrative record.

Judge Wolle also made a fact-finding: "The members of the county committee are different today than when the committee accepted Boddickers' application to purchase this inventory farm. The committee members who did not vote on this matter would not be able to contribute anything reliable to this record." The Court went on to specifically agree that a remand at this time "would inevitably result in nothing more than further post-hoc rationalizations, but in written form."

Despite the inadequate record presented by the agency, the District Court concluded: "The committee members gave credible testimony explaining their reasons for selecting Boddickers, based on reasons they had in mind when they voted in 1987." In short, the Court sustained the agency action based on post-hoc rationalizations given by the committee members or former committee members in their testimony before the reviewing court.

On September 17, 1993, Ziesers filed a motion for an order amending judgment in favor of Plaintiffs and against Defendants under Rules 52(b) and 59(a). On November 5, 1993, Judge Charles R. Wolle entered his order denying Ziesers' motion for order amending judgment. On December 2, 1993, Ziesers filed their Notice of Appeal from the final order of November 5, 1993.

Ziesers timely appealed to the United States Court of Appeals for the Eighth Circuit and argument was heard on June 13, 1994. A

decision was filed on June 21, 1994 affirming the decision of the District Court.

In its per curium opinion, the Eighth Circuit Court of Appeals stated that the District Court had found that, despite the failure of the Committee to state its reasons on the Form 440-2, as required, "the Committee's reasoning had been explained adequately by the Committee members' testimony", and that "a remand would not improve the quality of the evidence." The Eighth Circuit Court stated, "We agree that a remand to the County Committee members who made the original decision, which is the proper remedy for this procedural violation, would produce nothing that had not already been learned from their testimony. Therefore, such a remand is unnecessary, and we affirm."

ARUGUMENT FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Eighth Circuit has decided an important question of federal law which has not been, but should be, settled by the United States Supreme Court. In so doing, that Court has sanctioned a substantial departure, by the District Court, from the accepted and usual course of judicial proceedings.

Since the enactment of the federal Administrative Procedure Act, several landmark United States Supreme Court cases have been decided concerning the proper course a reviewing court should follow where the record for review is deficient in some respect. Although these cases have assisted reviewing courts in interpretation of the Administrative Procedure Act, the cases leave an important gap.

This Court has not answered the question of what course the reviewing court should follow when the agency has failed to comply

with a requirement that it fully document the reasons for its decision, when as a result the record is inadequate for review, and when remand to the agency for further development of a record is not appropriate or feasible.

SEC v. Chenery, Corp., 318 U.S. 80, 87 L.E. 626, 63 S.Ct. 454 (1943) provides guidance as to the proper course a court should follow where an agency makes an administrative order without setting out in sufficient detail the grounds for the order, sufficient for judicial review, but was decided prior to the adoption of the Administrative Procedure Act. In Chenery, supra, the Court of Appeals set aside the Commission's order, and this Court affirmed that Court, holding, at page 87: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

Writing for the majority in Chenery, supra, at page 88, Justice Frankfurter compared the judicial review of agency action to appellate review of a jury decision:

"But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders."

Justice Frankfurter went on to state, at page 94 of the Chenery decision:

"The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order.... There must be such a responsible finding. (citations omitted) There is no such finding here.

...(T)he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

Chenery was decided before the enactment of the Administrative Procedure Act, deals with an administrative order issued after an agency hearing procedure, and therefore does not directly decide the questions presented in the instant case. Chenery merely provides a beginning point for analysis and provides insight concerning the accepted and usual course for a reviewing court to follow where it lacks an adequate record for review.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 28 L.Ed. 2nd 136, 91 S.Ct. 814 (1971) is a landmark case decided under the Administrative Procedure Act in which the Supreme Court was again confronted with the failure of the agency to make formal findings and state reasons for the agency action taken.

Overton Park contains one important similarity to the instant case: In both cases, the agency action was subject to judicial review, yet the agency failed to make formal findings or state reasons for the agency action taken. However, Overton Park is inapposite to the instant case for two important reasons.

First, in Overton Park, the agency was not required by statute or by Department of Transportation regulations to make formal findings (see 401 U.S. pp. 409 and 417 to 418); while in the instant case the FmHA was required to "fully document" its reasons on a contemporaneous form to be signed by the decision-makers.

Second, in Overton Park, the focus of the judicial review was under the arbitrary and capricious standards set forth by 5 USC Sec 706(2)(A), because there was no procedural error established which would have required an analysis under 5 USC Sec 706(2)(D). (See 401 U.S. pp. 416 to 417.) In the instant case, the Ziesers have alleged and established procedural error which should have caused the reviewing court to inquire, under 5 USC Sec 706(2)(D), as to what course the reviewing court should take in light of such procedural error.

These differences account for the manner in which Overton Park was decided. The Supreme Court held, at 401 U.S. 420:

> "The court may require the administration officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision-makers is usually to be avoided. (citation omitted) And where there are administrative findings that were made at the same time as the decision ... there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by

examining the decision-makers themselves." (emphasis added)

Overton Park states that the reviewing court may require the agency decision-maker to testify where a record disclosing reasons for the agency decision was not required and not given, and where such testimony is necessary to effective judicial review. However, Overton Park did not decide whether a decision-maker should be allowed to testify, over the objection of the party seeking judicial review, in order to make up for the agency's failure to make a required record of reasons for its decision.[2] Nor does Overton Park adequately decide what course a reviewing court should follow if confronted with such a situation.

Overton Park does contain a footnote, at 401 U.S. 419, stating: "Even if formal

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[2] Any such interpretation would encourage an agency to ignore any record-making requirements and to then use its own non-compliance as a boot-strap to enable the agency to provide the court with post-hoc rationalizations contained in the minds of the decision-maker. Such an interpretation would further place unnecessary burdens on reviewing courts, would frustrate prompt and effective judicial review, and would encourage the sorts of agency abuses which the Administrative Procedure Act was designed to prevent or to remedy.

findings by the Secretary were mandatory, the proper course would be to remand the case to the District Court directing that court to order the Secretary to make formal findings." However, the contents of this footnote are dicta to the Overton Park case, as formal findings were not in fact required. That this point of law has not been decided by the Supreme Court is further indicated by the authority for the Overton Park footnote, which is a 1951 treatise on the jurisdiction of the Supreme Court of the United States. Further, under the circumstances of Overton Park, there would be no practical difference whether the agency decision was set aside and remanded to the agency, or merely remanded to the agency without being set aside, because the substantive law governing the routing of highways through parks had not changed from the time the DOT announced its decision until the time of the Supreme Court decision in Overton Park. If the case were remanded for the agency to explain its initial decision, the agency

would be required to show that it had considered other alternatives and had concluded that there was no other feasible and alternative route which would not use parkland, etc., before the highway could be built. (See 401 U.S. 411.) This same substantive standard would also apply if the decision had been set aside and had DOT then attempted to revive the highway project by making its decision anew in compliance with the law.

In the instant case, the substantive law has changed concerning disposition of FmHA inventory farms. The County Committee no longer exercises any discretion in the selection. Instead, eligible applicants are placed into preference categories, and if two or more applicants are in the same preference category, the decision is made by lot. If the agency action is set aside, the disposition of the Zieser inventory farm would proceed under law as it exists at the present time. Therefore, there would be a significant difference between merely remanding to the

agency for further explanation, as opposed to setting aside the agency action. A setting aside of the agency action would result in a rescission of the real estate conveyance, causing the farm to go back into FmHA inventory, and allowing the parties to apply for the farm under the new statutory and regulatory guidelines.[3]

Camp v. Pitts, 411 U.S. 138, 36 L.Ed. 2d 106, 93 S. Ct. 1241 (1973), revisited the issue of what course a reviewing court should follow when confronted with an inadequate record for review. The circumstances of Camp were even less similar to the instant case than were the circumstances of Overton Park. In Camp, as in

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[3] Such a rescission could be accomplished without causing Draconian consequences to the parties if a constructive trust were imposed by the District Court to balance the accounts of the parties. Although Boddickers would be stripped of a windfall, they took a quit-claim deed subject to FmHA regulation, and were on constructive notice of procedural defects at the time of the conveyance. Boddickers also received actual notice that their title to the farm was being challenged when Ziesers brought suit. FmHA would not be harmed, as the value of the farm has risen since it was conveyed to Boddickers. And Ziesers would in that manner have an opportunity to apply for the Zieser farm under circumstances guaranteeing fair consideration of their application.

Overton Park, the administrative agency was not required to make a record stating the reasons for its decision. However, in Camp, the agency had in fact briefly stated the reasons for its decision in two short letters, written contemporaneously with its decision.

In Camp, when the aggrieved party sought judicial review, the Court of Appeals ordered a trial de novo in District Court because the agency had not stated the basis of its decision with sufficient clarity for judicial review. This Court in Camp noted that "neither the National Bank Act nor the APA requires the Comptroller to hold a hearing or to make formal findings on the hearing record when passing on applications...." Camp v. Pitts, at page 138. The Supreme Court in Camp v. Pitts also concluded that a de novo trial in District Court, such as had been used in Overton Park would be inappropriate, holding as follows:

> The appropriate standard for review was, accordingly, whether the Comptroller's adjudication was "arbitrary, capricious, an abuse of discretion, or otherwise not in

> accordance with law," as specified in 5 U.S.C. Sec. 706(2)(A). In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. ...
>
> If ... there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a de novo hearing but, as contemplated by Overton Park, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary. We add a caveat, however. Unlike Overton Park, in the present case there was contemporaneous explanation for the agency decision. The explanation may have been curt, but it surely indicated the determinative reason for the final action taken.... The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration." Camp v. Pitts, pp. 142-143.

In Camp v. Pitts, the agency was not required to make a contemporaneous record

stating reasons for its decision, but it did in fact do so, even if the reasons stated were terse. In the instant case, on the other hand, the agency was required to make a contemporaneous record fully documenting reasons for its decision, but failed to do so. Therefore the cases are inapposite, and this Court has still not ruled on what course the reviewing court should take under the circumstances of the instant case.

Camp rejected a de novo hearing and required the validity of the agency action to stand or fall based on the contemporaneous reasons given by the agency. The effect of the court's ruling was to prevent the agency from inventing new reasons justifying its decision after judicial review had been sought, while allowing the agency to explain, through affidavits or testimony, reasons articulated contemporaneously with the agency action. Although Camp suggested that the District Court could resort to affidavits or testimony to enable effective judicial review in the

circumstances presented in that case, no record had been required in the first place. Therefore, Camp resembles Overton Park, but enunciates a clear preference for contemporaneous reasons over post hoc explanations, and requires the agency decision to stand or fall on those contemporaneous reasons.

In the instant case, no contemporaneous reasons were provided by the agency, even though it was required to fully document those reasons. Applying the logic of Camp, it would be appropriate to require the agency decision to stand or fall based on the contents of the Boddicker Form 440-2, i.e. based on the lack of reasons the agency was supposed to provide but did not. An action taken for no reason is arbitrary and capricious.

In the instant case, unlike the parties seeking judicial review in Overton Park and in Camp, the Ziesers have alleged and proven a procedural violation under 5 U.S.C. Sec. 706(2)(D), providing the court with an extra

basis for setting aside the agency action. The agency's failure to observe procedure required by law was prejudicial to the Zieser's, as the failure of the decision-maker to fully document reasons for the agency action on the Form 440-2 as required, prevented Ziesers from obtaining effective judicial review of the action taken to determine whether the decision-maker considered the relevant factors it was required to consider, and whether the decision was arbitrary and capricious. Furthermore, the requirement that the decision-maker fully document reasons for the decision would tend to guide the thinking of the decision-makers and provide an important procedural protection in the face of otherwise unfettered discretion. However, this Court has not been presented with the opportunity to address such issues of substantial importance to the interpretation of the Administrative Procedure Act.

The Supreme Court's aversion for de novo review of agency action is also set forth in Fla. Power & Light Co. v. Lorian, 470 U.S. 729,

84 L. Ed. 2d 643, 105 S. Ct. 1598. In Fla. Power this Court was attempting to decide whether the courts of appeals had exclusive subject matter jurisdiction initially to review decisions of the Nuclear Regulatory Commission denying a citizen's petition concerning licensing. Such agency action is informal and does not involve a hearing. This court rejected the argument that, because such informal agency action does not result in a hearing before the agency, initial review should be held in the District Courts so that the District Court could use its fact-finding powers and develop a hearing record for review by the Court of Appeals. (See 470 U.S. at p. 743.) In rejecting that argument, this Court held, at 470 U.S. pp. 743-744:

> Such a justification cannot, however, be squared with fundamental principles of judicial review of agency action. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 US 138, 142, ... The task of the reviewing court is

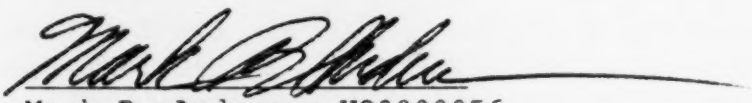
> to apply the appropriate APA standard of review, 5 USC Sec. 706, to the agency decision based on the record the agency presents to the reviewing court. Citizens to Preserve Overton Park v. Volpe....
>
> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. ... The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred." (emphasis added)

The instant case presents this course with the "rare circumstance" referred to in Fla. Power, where the proper course is not to remand to the agency for additional investigation or explanation. There is no decision-maker to remand the case to, and even if remand were attempted, it would only result

in further post-hoc rationalization.[4] Unfortunately, this Court in Fla. Power did not have occasion to decide what the proper course is where remand is clearly not proper or feasible.

In conclusion, the instant case presents substantial and important questions concerning the interpretation of the federal APA which have yet to be decided by this Court. Furthermore, in upholding the District Court's procedure, the Eighth Circuit Court of Appeals has sanctioned such a substantial departure from the accepted and usual course of judicial proceedings, as to call for an exercise of the United States Supreme Court's power of supervision.

Respectfully submitted,



Mark B. Anderson HO0000056
Attorney for Appellants

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[4] Because the FmHA Buchanan County Committee which made the decision has now been reconstituted, it would be impossible to remand this case for further explanation of the decision even if that were an appropriate remedy, which it would not be.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 93-3970NI

CURTIS LEO ZIESER, AND DAVID CHARLES ZIESER, APPELLANTS VS. FARMERS HOME ADMINISTRATION, RICHARD LYNG, Secretary of Agriculture, VANCE CLARK, Administrator of the Farmers Home Administration, ROBERT R. PIM, State Director of the Farmers Home Administration, JOHN DUESBURY, District Director of the Farmers Home Administration, LONNIE J. JANACHEK, Buchanan County Supervisor of the Farmers Home Administration, ROBERT J. MORONY, Chair-	)	On Appeal from the United States District Court for the Northern District of Iowa (UNPUBLISHED)

person of the FmHA)
Buchanan County Committee)
CARROLL BANTZ, Member of)
the FmHA Buchanan County)
Committee, MELVIN HALL,)
Member of the FmHA)
Buchanan County Committee)
MARK BODDICKER, PAMELA)
BODDICKER, and UNITED)
STATES OF AMERICA)
)
APPELLEES)

Submitted: June 13, 1994

Filed June 21, 1994

Before RICHARD S. ARNOLD, Chief Judge, WELLFORD,* Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIUM.

Curtis and David Zieser brought this complaint seeking to overturn the decision of the Farmers Home Administration (FmHA) Buchanan County Committee awarding the Zieser inventory farm to Mark and Pamela Boddicker. They allege that the County Committee failed to document on FmHA Form 440-2 its reasons for awarding the

farm to the Boddickers rather than the Ziesers, as required by 7 C.F.R. Section 1955.106(d)(2). Finding that the Committee indeed had violated FmHA procedures, the Magistrate Judge recommended that this cause be remanded to the Committee for an explanation. The District Court[1] disagreed, finding that the Committee's reasoning had been explained adequately by the mmittee members' testimony, and that a remand would not improve the quality of the evidence. We agree that a remand to the County Committee members who made the original decision, which is the proper remedy for this procedural violation, would produce nothing that has not already been learned from their testimony. Therefore, such a remand is unnecessary, and we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

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[1] The Hon. Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa, sitting by designation.

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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*The Hon. Harry W. Wellford, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

CURTIS LEO ZIESER, AND DAVID CHARLES ZIESER,	)	NO. C 88-2033
PLAINTIFFS	)	
VS.	)	
FARMERS HOME ADMINISTRATION, RICHARD LYNG, Secretary of Agriculture, VANCE CLARK, Administrator of the Farmers Home Administration, ROBERT R. PIM, State Director of the Farmers Home Administration, JOHN DUESBURY, District Director of the Farmers Home Administration, LONNIE J. JANACHEK, Buchanan County Supervisor of the Farmers Home Administration, ROBERT J. MORONY, Chairperson of the FmHA Buchanan County Committee CARROLL BANTZ, Member of the FmHA Buchanan County Committee, MELVIN HALL, Member of the FmHA Buchanan County Committee MARK BODDICKER, PAMELA BODDICKER, and UNITED STATES OF AMERICA	)	RULING ON OBJECTIONS AND FINAL JUDGMENT FOR DEFENDANTS
DEFENDANTS	)	

This court referred this case to United States Magistrate Judge Mark W. Bennett for a hearing and Report and Recommendation; the Report and Recommendation was filed on March 31, 1993.

All parties objected to portions of the Report and Recommendation. On April 19, 1993, the court held a telephone conference hearing to receive arguments of counsel in support of and resistance to the objections. The parties were granted permission to file a proposed decision by May 3, 1993. The court has now reviewed the extensive administrative file, the briefs and proposed decisions presented by the parties, and plenary evidentiary record made before Magistrate Judge Mark W. Bennett that preceded his filing of the Report and Recommendation now before the court for review.

I conclude that most objections to the Report and Recommendation are without merit, but the parties' objections to the partial

remand recommended by the magistrate judge are valid and here sustained. Remand would be inappropriate. The record is now adequate for entry of a final decision on the merits of this case. The clerk of court shall enter judgment dismissing with prejudice plaintiffs' action seeking to set aside the decision of the Farmers Home Administration (FmHA) to sell the inventory farm to Mark and Pamela Boddicker.

FINDINGS OF FACT

Upon de novo review, this court now adopts the findings of fact set forth in the paragraphs of the magistrate judge's Report and Recommendation at pages 2-9, with the following exceptions:

(a) The first two sentences of footnote number one were properly removed by the magistrate judge's addendum filed on April 13, 1993. Those two sentences are deemed of no consequence.

(b) The court corrects an obvious clerical error by substituting for the word "Ziesers" the word "Boddickers" in the twelfth line on page 6. FmHA had calculated that the Boddickers had a positive 11.5% return on assets.

(c) The court changes the date "January 4, 1988" to "December 23, 1987" in the thirteenth line on page 8. Boddickers and the United States entered into a real estate contract on December 23, 1987, not January 4, 1988.

ADDITIONAL FINDINGS OF FACT

The greater weight of the evidence and material in the administrative record establish the following facts in addition to those adopted from the Report and Recommendation of the magistrate judge:

1. The County Committee members gave credible testimony concerning their knowledge and familiarity with the Ziesers and

Boddickers. They explained adequately the factors they considered in deciding who was the most eligible applicant for the inventory farm and who would most likely succeed in farming it.

2. When committee members interviewed the Ziesers and Boddickers, they adequately examined them on relevant matters concerning who would best be able to operate the inventory farm successfully.

3. County Committee member Melvin Hall gave a reasoned explanation why he believed Mark Boddicker was the more experienced farmer, with better knowledge of farming and superior management skills. Hall considered appropriate factors in voting to accept the Boddickers' application.

4. County committee member Carroll Bantz voted to have Boddickers' application accepted because he believed Boddicker was a more experienced farmer in comparison with Ziesers.

He believed Mark Boddicker displayed a superior knowledge of farming operations and was impressed with factors other than the loan risk index.

5. County committee member Robert Morony voted to accept the Boddickers' application because Mark Boddicker seemed more knowledgeable than the Ziesers. He found Boddicker more direct in explaining farming procedures and his plans for the farming operation. Morony did not chose to vote for Ziesers during the February 1988 meeting. He believed Mark Boddicker was the stronger applicant, having a better grasp of the entire farm operation.

6. All three county committee members gave reasoned decisions for believing Boddickers would be more likely than Ziesers to succeed in farming the inventory farm.

7. The members of the county committee are different today than when the committee

accepted Boddickers' application to purchase this inventory farm. The committee members who did not vote on this matter would not be able to contribute anything reliable to this record. Consequently, they have no authority to act for the committee or FmHA at this time and would not have the authority now to document the reasons they selected Boddickers. The testimony the county committee members presented in this case is as useful a guide as remand would be to provide a record of why the committee selected Boddickers. The administrative record, supplemented by testimony presented in this judicial review proceeding, provides this court an adequate record for review of the reasons why the county committee selected Boddickers rather than Ziesers to purchase the inventory farm.

CONCLUSIONS OF LAW

A. The court adopts the portions of the Conclusions of Law set forth in paragraphs A

and B of the magistrate judge's Report and Recommendation, at pages 9-12. The court does not accept the recommendation for a remand in those portions of the conclusions of law entitled "The Record" and "Remand."

Remand to the county committee members would not improve the quality of the evidence presented for this court's review of the FmHA agency action. The committee members gave credible testimony explaining their reasons for selecting Boddickers, based on reasons they had in mind when they voted in 1987. Their reasons were sound, not arbitrary or capricious, even though they did not properly make an administrative record at the time documenting their reasons. Remand is not necessary in order that this court may understand the reasons the county committee members gave for selecting Boddickers.

In Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985), the Court explained

that remand for additional investigation and explanation by an administrative agency is necessary when the reviewing court cannot on the record before it evaluate the challenged agency action. But here the record developed at the hearing before the magistrate judge is fully adequate for decision of the FmHA action here challenged. This is a case where remand is both unnecessary and unlikely to provide a better record than the parties have already presented for the court's review.

This court adopts in full the portion of the Conclusions of Law in the Report and Recommendation entitled "Bad faith or Pre-determined Result in the Selection Process." Ziesers have entirely failed to establish that the county committee's decision was affected by external or improper influences. FmHA supervisor Lonnie Janechek did incorrectly alter part of the administrative record, but Ziesers have not established that those

alterations prove a cover-up, improper motivation on the part of the committee members, or any other improper conduct by the committee.

The court adopts that portion of the conclusions of Law entitled "Applicability of the Agricultural Credit Act of 1987." The Agricultural Act of 1987 does not apply to the decision of FmHA here being reviewed.

CONCLUSION

This case need not be remanded for further development of an administrative record.

The court agrees with Ziesers' statement that a remand at this time "would inevitably result in nothing more than further post-hoc rationalizations, but in written form." The parties' objection to the recommended remand is sustained.

Reviewing the entire evidentiary record de novo, the court holds that the plaintiffs Curtis Leo Zieser and David Charles Zieser have

not established their contention that FmHA should not have selected Boddickers to purchase the inventory farm here at stake. The county committee properly considered the applicants who wished to purchase the farm and found Boddickers rather than Ziesers to be the applicants for the inventory farm who presented the greatest likelihood that I would be farmed successfully. That decision was neither arbitrary nor capricious.

The court therefore dismisses with prejudice the complaint of the Ziesers asking this court to set aside the action of the defendant Farmers Home Administration to sell the inventory farm to defendants Mark Boddicker and Pamela J. Boddicker. The clerk of court shall enter judgment for the defendants and against the plaintiffs, at plaintiffs' costs.

IT IS SO ORDERED.

Dated this 1st day of September, 1993.

\s\Charles R. Wolle, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

CURTIS LEO ZIESER and DAVID CHARLES ZIESER,	:	
Plaintiffs,	:	NO. C 88-2033
vs.	:	
FARMERS HOME ADMINISTRATION, et.al	:	REPORT AND RECOMMENDATION
Defendants	:	

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs Curtis Leo Zieser and David Charles Zieser ("Ziesers") are farmers who are challenging a determination made on December 23, 1987, by Defendant Farmers Home Administration ("FmHA") to sell a farm to Defendants Mark Boddicker and Pamela Boddicker ("Boddickers") pursuant to 7 U.S.C. Sec. 1985 (e)(1)(C). Plaintiffs seek judicial review of

FmHA's actions in selling the farm under the Administrative Procedure Act ("APA"), 5 U.S.C. Sec. 706(2). This case was referred to the undersigned United States magistrate judge for report an recommendation pursuant to 28 U.S.C. Sec. 636(b)(1)(B) on August 6, 1992. An evidentiary hearing was held on November 24 and 25, 1992. The Ziesers were present and represented by Karl G. Knudsen of Decorah, Iowa and Mark B. Anderson, of Cresco, Iowa. The Boddickers were present and represented by Guy Booth of Cedar Rapids, Iowa, and the FmHA was represented by Paul C. Lillios, Assistant United States Attorney for the Northern District of Iowa. The Ziesers allege that the FmHA failed to follow certain provisions of the Agricultural Credit Act of 1987 in its selection process; that the FmHA acted in an arbitrary and capricious manner in choosing to sell the farm to the Boddickers; that the FmHA's decision regarding the sale of the farm

was a predetermined result; and that the court does not have before it a full and complete record with which to review the FmHA's action.

Following the evidentiary hearing on this matter, a briefing schedule was set by the court. Defendants filed their brief on February 22, 1993, and the Ziesers filed a reply brief on March 9, 1993.[1] This matter is now fully submitted.

II. FINDINGS OF FACT

On February 19, 1987, the FmHA acquired a 180 acre farm ("the Zieser farm") through foreclosure proceedings from Charles and Marjorie Zieser. The Zieser inventory farm consists of a 100 acre tract and a 80 acre

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[1] Ziesers' counsel failed to file an initial brief pursuant to the briefing schedule. This irregularity has caused a muddying of the legal waters in this case as the precise position of the party bearing the burden of proof, the Ziesers, was not before Defendants at the time they filed their brief in this matter. Ziesers' counsel did file a reply to the FmHA's brief. Although Ziesers' reply brief violates Local Rule 14(j), the court will consider the arguments raised in it.

parcel in Buchanan County, Iowa. The Ziesers are sons of Charles and Marjorie Zieser.

In the fall of 1987, the Buchanan County FmHA Committee ("the committee") consisted of three members, Robert Moroney, Carroll Vantz and Richard Seamans. Melvin Hall was an alternate committee member who sat on the committee when one of the committee members was absent. All the committee members were farmers from Buchanan County. The committee selected the individuals who would be permitted to purchase inventory farms held by the FmHA pursuant to 7 U.S.C. Section 1985(e)(4)(C)(1982 & Supp. IV 1986).[2] Each applicant who applied to purchase an inventory farm submitted an FmHA services application, a "Farm and Home Plan"

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[2] Section 1985(e)(4)(C) provides that:

> If two or more qualified operators of not larger than family-size farms desire to purchase, or lease with an option to purchase, such land, the appropriate county committee shall, by a majority vote, select the operator who may purchase such land, on such basis as the Secretary may prescribe by regulation.

financial statement and tax records. To aid the committee in its consideration of an applicant's financial condition, the FmHA prepared a "loan risk index" for each applicant.[3] The loan risk index is a three to twelve point sliding scale, with three being the best possible rating, in which an applicant is graded according to three ratios; total liabilities to total assets, return on assets, and repayment ability margin.[4] Although the

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[3] The committee used the loan risk index as a means of implementing consideration of the factors enumerated in 7 C.F.R. Sec. 1955.106(d)(2)(1987). Section 1955.106(d)(2) provided that some of the factors the committee would consider in the selection process included the applicant's liquidity, solvency, profitability, and efficiency.

[4] The FmHA instructions for the loan risk index indicate how each of these ratios is achieved:

> This Loan Risk Index calculation method may be used to assist the County Committee in its selection of Farm Inventory Purchasers. The data used to calculate the ratios will be obtained from the applicant's most recent balance sheet and the proposed farm plan for the current year. The method for calculating each ratio is described below. The calculation maybe documented in the running record and in accordance with the following used by the County Committee as basis for selecting applicant for purchase of Inventory Farms.

A. Total liabilities/total assets = Total liabilities from the projected balance sheet divided by total assets from the projected balance sheet shown as though the loan for purchase has been made. The values used in the calculation of the ratio should be the current market value and not the cost basis. For corporations, cooperatives, partnerships or joint operations the total liabilities and total assets from the entities' balance sheet plus the total liabilities an assets from the balance sheets obtained from the entity members.

B. Return of Assets = Last 3 years average net cash income (before interest payments) minus family living expenses divided by total assets. Net cash income is calculated by taking gross cash income minus all cash farm operating expenses (excluding interest). Total assets should be the market value of all assets on the projected balance.

C. Balance available/total debt payments = Balance available is gross cash farm income minus (all cash farm operating expenses + family living expenses + capital purchases) plus (non-farm income + cash carry-over + interest) plus (loans and other operating credit). This balance would then be divided by total debt payments which includes all principal and interest payments due (including delinquencies), all open accounts which are due, and income and social security taxes due. Limited Resource rates will be utilized when needed.

Once the ratios are calculated as described above, the box above the range in which the calculated ratio fell will be checked on the worksheet. These ranges are assigned a value of 1-4, with 1 being the lowest risk and 4 the highest risk. The points associated with each box (1-4) will be totaled and this will determine the loan risk index. Applicants having the lowest risk maybe first selected by the County Committee. Everything else being equal County Committee may

loan risk index was used by the committee to cull some applicants who would not be invited for interviews, the loan risk index was not dispositive in the selection process. In selecting the applicant who would be permitted to purchase an inventory farm, the committee considered the financial state of each applicant as well as such subjective criteria as the agricultural business acumen of the applicant and the applicant's plans for the inventory property.[5]

On August 26, 1987, Mark Boddicker interviewed with the committee concerning his eligibility to purchase the Anderson inventory farm.[6] After meeting with Mark Boddicker on

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want to give preference to families buying their first piece of farm ground.

A maximum of 10% down payment maybe accepted. The amount of down payment should not be a factor if the ratios are in order. Gov't Ex. B.

[5] Depending on the number of applicants for a particular inventory farm, the committee would decide whether is was necessary to hold interviews with the applicants.

[6] Mark Boddicker testified at the evidentiary hearing that he had not previously interviewed with the committee at the time of his

that date, committee members Moroney and Vantz signed Boddickers' FmHA form 440-2 which indicated that Boddickers were "eligible" to purchase the Anderson farm. Boddickers were not selected to purchase the Anderson inventory farm. In September of 1987, Mark Boddicker returned to the offices of the Buchanan County FmHA in order to recertify their application so that their application would remain on file at the Buchanan County FmHA. At that time Boddicker, for the first time, observed a plat map which indicated inventory farms held by the Buchanan County FmHA. The Zieser farm was among the inventory farms on plat map. Boddicker inquired about the Zieser farm, and was told that the farm would not be put up for sale until later in the fall.

In November of 1987, the FmHA offered the Zieser inventory farm for sale. Eleven

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December 10, 1987, interview. Although not crucial for the purposes of this report and recommendation, the court has resolved this conflict in testimony against Boddicker.

applications to purchase the farm were received by the Buchanan County FmHA prior to December 1, 1987. Of these eleven applicants, five were selected to be interviewed by the committee. The Boddickers and the Ziesers were two of the five finalist applicants selected to be interviewed by the committee. The FmHA computed that the Boddickers had a loan risk index of 3, and the Ziesers had a loan risk index of 6. The difference between the Ziesers and the Boddickers respective loan risk index rates turned on the FmHA's calculations in regard to that portion of the loan risk index pertaining to return on assets. The FmHA had calculated that the Ziesers had a positive 11.5 percent return on assets. This calculation resulted in the Boddickers receiving a score of one on that portion of the index. The FmHA, on the other hand, computed that the Ziesers had a negative 5.7 percent return on assets. This computation in turn caused the Ziesers to

receive a score of four, the lowest possible score, for that part of the index.

The difference between the Boddickers' and the Ziesers' scores on the return on assets segment of the index was due to the way the Boddickers and the Ziesers had elected to treat the loans they received from Commodity Credit Corporation ("CCC"), for their sealed grain, on their income tax returns. The Boddickers declared all loans for sealed grains as income. The Ziesers, on the other hand, chose not to declare the loans for sealed grains as income until the CCC calls the loans. FmHA applicants were not required to list sealed grains on their applications. Another significant factor in the Ziesers receiving a score of four on the return on assets portion of the index was the amount of money the FmHA determined was necessary for family expenses of the Ziesers. The Ziesers had jointly declared $18,000 as their estimated family expenses on their farm

and home plan.[7] Janechek determined that this amount was inadequate, and raised the amount to $30,000.[8]

On December 10, 1987, committee members Moroney, Vantz and Seamans interviewed Mark Boddicker regarding his application to purchase the Zieser inventory farm. Also present at the December 10, 1987, meeting were Buchanan County FmHA Supervisor Lonnie Janechek and his assistant Todd Jacklin. On December 23, 1987, committee members Moroney, Vantz and Hall met and interviewed the other four final applicants, including the Ziesers.[9]

After meeting with these applicants, the committee signed the Ziesers' FmHA 404-2 form

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[7] David Zieser was married with two children. Curtis Zieser was single.

[8] By way of comparison, the Boddickers had declared $25,000 for family expenses.

[9] Although Hall was not present when the committee interviewed Mark Boddicker on December 10, 1987, he was told about Boddicker's presentation by the other two committee members and relied upon their assessment of his presentation. Hall, however, did independently review the financial records of both the Boddickers and the Ziesers.

indicating the Ziesers were "eligible" to purchase the Zieser inventory farm.[10] The committee then deliberated and selected the Boddickers as the best qualified applicant to purchase the Zieser inventory farm. The reasons for the committee's decision in selecting the Boddickers as the best qualified applicant were not documented on the Boddickers' 440-2 form.[11] The "running record" maintained by the FmHA in the Boddickers' file, however, states the following reasons:

> Review w/county committee (already determined eligible in 8/87); felt "A" best possible borrower; Co. committee selected to purchase 180 ac farm (formerly Charles Zieser) Committee in attendance + Robert Moroney, Carroll Bantz, Melvin Hall.

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[10] Janechek was responsible for filing the 440-2 forms after the meeting. The committee members would then sign the forms.

[11] The Boddickers' 440-2 form currently states "Eligible-Farm." In December of 1987, however, the form read "Eligible-Selected for Farm 180 AC- family Charlie Zieser." At some point after the December 23, 1987, committee meeting and April 24, 1988, Janechek whited out the other language. He testified that he took this action in an effort to keep the 404-2 form as "clean" as possible and to make sure there was "not too much wording on it." The Ziesers' 440-2 form also contains the single word, "Eligible."

Gov't Ex. B; Pl. TRO Ex. 26.[12] Similarly, the committee's minutes for December 23, 1987, states:

> Above apps. were reviewed and one person selected by Co. committee as most eligible to receive inventory farms FmHA has for sale. Those were: Mark Boddicker - Charles Zieser farm.

Gov't Ex. B; Pl. TRO Ex. 28. On January 4, 1988, the Boddickers and the United States entered into a real estate contract for the sale of the Zieser farm.

On January 13 and 14, 1988, the Ziesers met with FmHA Assistant County Supervisor Todd Jacklin to voice their objections to the committee's decision to not select them to purchase the Zieser farm. The Ziesers specifically objected to the FmHA's calculation of their loan risk index. Their objections centered on the omission of the sealed grain proceeds from the FmHA's calculations and the change in the amount of their estimated family expenses. Following this meeting, the FmHA agreed to reconvene the committee to consider the Ziesers' application with modifications made to their loan index score calculation.

When the FmHA recalculated the Ziesers' loan risk index with an additional $60,000 in income to reflect the sealed grain and lowered the Ziesers' family expenses to $18,000 per year, the Ziesers received a score of three on

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[12] Following the TRO hearing in this case in April of 1988, Janechek altered the Boddickers' running record by adding the phrase "(Sharp individual)" to the December 23, 1987, entry.

the index.[13] After reconsidering the Ziesers' application with the revised loan risk index, the committee voted to sustain its original decision and award the Zieser farm to the Boddickers. The committee minutes for February 17, 1988, state: "No change from the initial decision on [sic] w/ the new info. presented. . . . Committee felt best candidate selected the 1st time." Gov't Ex. B. Similarly, the Ziesers' running record states: "Co. Committee felt that even w/ this change in index that their 1st decision would still stand as the best eligible person." Gov't Ex. B.

None of the committee members were told how to vote concerning the disposition of the Zieser farm. Furthermore, the committee made no pre-determination regarding the sale of the Zieser farm.

III. CONCLUSIONS OF LAW

A. Standard of Review

Section 706 of the Administrative Procedure Act provides, in pertinent part, that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an

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[13] It is unclear from the record why the FmHA added $60,000 to the Ziesers' computation, and not $66,000, the amount the Ziesers had in sealed grain proceeds.

> agency action. The reviewing court shall-
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be-
>
> (A) Arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. . . .

5 U.S.C. Sec. 706(2)(A).

The "arbitrary and capricious" standard of review is "deferential to the agency's interpretation of its own regulations and only permitting reversal if the agency action is without a rational basis." Educational Assistance Corp. v. Cavazos, 902 F.2d 617, 622 (8th Cir. 1990); Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir 1981). Under this standard, the agency's action is entitled to a "presumption of regularity." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). A reviewing court is not permitted to substitute its judgment for that of the agency.

Id. at 416; Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

"Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.'" State Farm Mut. Auto. Ins. Co., 463 W.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). The Court in State Farm went on to note that:

> Normally, an agency rule would be arbitrary and capricious if the agency had relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to. . . agency expertise.

Id. The reviewing court must

> consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

> Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.

Volpe, 401 U.S. at 416.

B. Scope of Review

Generally, judicial review of an agency decision is limited to the administrative record before the agency, "not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973) see Volpe, 401 U.S. at 420.[14] An exception to the general rule applies in those cases where "there was such a failure to explain administrative action as to frustrate effective judicial review." Camp, 411 U.S. at 142-43. When the court confronts an inadequate administrative record,

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[14] *De novo* relief is appropriate in only two limited situations: where there are inadequate fact finding procedures in an adjudicatory proceeding, or where the judicial proceedings under review are brought to enforce certain administration actions. *Camp*, 411 U.S. at 142; *Volpe*, 401 W.S. at 415. Neither circumstance is present in this case.

it has the option to "obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary." Id. at 143. This material, however, should be merely explanatory of the original agency record, and should not contain post-hoc rationalizations for the agency's decision. Costle, 657 F.2d at 285; Bunker Hill Co. V. Environmental Protection Agency, 572 F.2d 1286, 1292 (9th Cir. 1977).

A corollary to the limitation on the admissibility of those materials from outside the administrative record exists in those cases where a plaintiff alleges bad faith on the part of the agency. See Volpe, 401 U.S. at 420 (inquiring into the mental processes of administrative decision makers may occur upon a strong showing of improper behavior or bad faith); Public Power Council v. Johnson, 674 F.2d 791, 795 (9th Cir. 1982) (courts will

consider materials outside of the administrative record when bad faith is alleged); see also Applications Research Corp. v. Naval Air Dev. Ctr., 752 F.Supp. 660, 667 (E.D. Pa. 1990); cf. Apex Constr. Co. v. United States, 719 F.Supp. 1144, 1147 (D. Mass. 1989) (discovery of more than the administrative record is appropriate when plaintiff alleges bad faith and provides a factual basis for that claim).

C. The Record

7.C.F.R. Section 1955.106 (1987) governed the procedures to be followed by the committee in the selection of the purchaser for the Zieser farm, and provided in relevant part:

> If two or more eligible operators of not larger than family-size farms wish to purchase a suitable farm, the county Committee will select the operator who in their opinion has the best chance for success based upon an evaluation of their past farm records and proposed farm plans. This operators offer will be accepted. The reasons explaining the County Committee's selection of the best qualified applicant will be fully

> documented on Form FmHA 440-2, "County Committee Certification or Recommendation." Some of the factors the will consider include but are not limited to:
>
> (i) Liquidity. consider working capital, each flow, the ratios of current assets to current liabilities and current liabilities to total liabilities.
>
> (ii) Solvency. consider net worth and the ratio of total liabilities to net worth.
>
> (iii) Profitability. Consider net farm income and the ratio of net farm income to net worth.
>
> (iv) Efficiency. Consider the ratios of cash operating expenses to gross receipts and debt repayment to gross receipts.

7 C.F.R. Section 1955.106 (d)(2)(1987).

The committee, however, did not follow the requirements of 7 C.F.R. Section 1955.106(d)(2), to document its reasons for selection the Boddickers. The Boddickers' 440-2 form currently contains only the words: "Eligible- Farm."[15] This error is compounded by the committee's failure to document its

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[15] Even in its original form, the Boddickers' 440-2 did not even offer a hint as to the committee's reasoning which underscored their decision to award the Zieser farm to the Boddickers.

reasons elsewhere in the administrative record. Instead, the record only contains two cryptic and conclusory statements regarding the committee's decision to select the Boddickers as the applicants who would be permitted to purchase the farm. In the FmHA committee minutes the Boddickers are described as "most eligible to receive inventory farms. . . ." Similarly, the running record in the Boddickers' FmHA file only states that the Boddickers were "the best possible borrower." Neither of these documents provide any insight into the committee's reasoning in the selection process. Thus, the court is confronted with the problem in this case that the committee's reason for selecting the Boddickers as the applicant to purchase the Zieser farm do not appear in the administrative record. Because the base reasons for the committee's selection of the Boddickers do not appear in the administrative record, the testimony of the

committee members concerning their individual reasons for selecting the Boddickers must be deemed to represent impermissible post hoc rationalizations. This makes effective judicial review of the FmHA's decision in this case impossible. It is, of course, the general rule that an agency may not rely on such post hoc reasoning, when raised for the first time during the course of litigation, as the basis for its decision. Volpe, 401 U.S. at 419; Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962).

D. Remand

In Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), the Supreme court declared:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant facts, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Id. at 744. Here, the court finds that evaluation of the FmHA's decision to sell the farm to the Boddickers is not possible upon the administrative record currently before the court. While the court is not unsympathetic to the Zieser' and the Boddickers' desires to have a final resolution in this case given the subject matter and age of this litigation, the court will recommend that this case be remanded to the FmHA Buchanan County committee for a full and detailed explanation of its reasons for selecting the Boddickers. Although the reasons submitted by the committee will to some extent have the specter of post hoc rationalizations, they will be subjected to more critical judicial review. Volpe, 401 U.S. at 420; City Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 600 F.2d 681, 690 (9th Cir. 1979). While the court has concluded that remand is necessary in order that the committee may state its reasons for selecting the

Boddickers, the remand is only necessary for adequate judicial review of whether the committee acted in an arbitrary and capricious manner in its selection process.

E. Bad faith or Pre-determined Result in the Selection Process

The issue of whether the committee acted in bad faith in the selection process may be decided on the record before the court. The Ziesers have argued that the committee's decision was the result of bias or some pre-determined decision on its part to award the Boddickers the Zieser farm.[16] As discussed above, infra at page 11, when allegations of bad faith on the part of an agency are propounded, the reviewing court is permitted some degree of laxity in the consideration of materials outside the administrative record.

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[16] The court noted that although the Ziesers have not pursued this line of argument in their reply brief, Defendants have briefed the issue. Therefore, the court is of the opinion that this issue is still in controversy.

See Volpe, 401 U.S. at 420. Here, the court has considered the testimony of each of the committee members and Buchanan County FmHA supervisor Lonnie Janechek on this issue. The court concludes that the committee's decision to select the Boddickers was reached only after considering all of the applicants for the property, and was reached in good faith. The committee's decision was not the product of external or improper influences. While Janechek did make two alterations to FmHA documents after the Boddickers were selected, the court concludes that these alterations were not done for the purpose of hiding conspiratorial actions, but where instead merely sloppy, unilateral attempts to bolster the administrative record with the committee's reasoning.[17]

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[17] The court has concluded that the committee's decision was not a predetermined result or reached in bad faith. This conclusion in no way approves Janechek's actions in altering the agency records. The court finds Janechek's explanation for his conduct - to "clean" the

F. Applicability of the Agricultural Credit Act of 1987

Finally, the parties contest whether the Agricultural Credit Act of 1987, Pub. L. 100-233 (1988) (codified in scattered sections of 7 U.S.C.), is applicable in this case. The court concludes that the Agricultural Credit Act of 1987 is not applicable herein because the committee's initial, and undisturbed, decision to sell the property to the Boddicker occurred prior to passage of the Act. See Criger v. Becton, 902 F.2d 1348, 1353 (8th Cir. 1990)(holding that regulation was to be given

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record and that he was "concerned about the extra words on it" to be preposterous. Such alteration of administrative records by administrative personnel in order to bolster an agency's position in a case is totally unacceptable to the court. These actions have the obvious effect of retarding, rather than facilitating, judicial review of agency decisions. The court is placed in the untenable position of having to ferret out the actual administrative record compiled at the time of the agency's decision from that of the revisionist additions. Fortunately, in this case, Janechek's attempts at unilateral modification of the administrative record were minor and did not effect the court's ability to conduct judicial review.

prospective effect only absent legislative intent to the contrary).

The deadline for submission of applications for the Zieser farm closed on December 1, 1987. The applicants were then screened and five applicants were invited for interviews with the committee. On December 23, 1987, after concluding their interviews with the finalist applicants, the committee selected the Boddickers as the applicant who would be allowed to purchase the Zieser farm. Subsequently, on January 4, 1988, the FmHA entered into a binding real estate contract with the Boddickers for the sale of he Zieser farm. On January 6, 1988, the Agricultural Credit Act of 1987 became effective. Although the committee did agree to meet with the Ziesers on January 13 and 14, 1988, and again on February 17, 1988, the FmHA took no action to annul, revoke or rescind its real estate contract with the Boddickers after passage of

the Agricultural Credit Act of 1987. The court concludes that the committee's review of the Ziesers' application on February 17, 1988, was conducted only to ensure that the index variations between the Ziesers and the Boddickers had not been determinative in the selection process. This review process was not one which necessitated that the committee vacate its prior decision as a predicate for review to occur. Because the committee's selection of the Boddickers was never set aside, the court concludes that the Agricultural Act of 1987 is inapplicable in this case.[18]

IV. CONCLUSION

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[18] Because the Ziesers do not argue that the provisions of the Agricultural Act of 1987 must be given retrospective application, the court need not address that issue. The court, however, does note that under the law of this circuit that a presumption against retroactivity of legislation exists in the absence of clear congressional intent to the contrary. *Parton b. GTE North, Inc.*, 971 F.2d 150, 155 (8th Cir. 1992); *accord Fray v. Omaha World Herald Co., 960 F.2d 1370, 1374-75 (8th Cir. 1992).*

The court concludes that the Ziesers have failed to carry their burden of proof that the committee's decision to permit the Boddickers to purchase the Zieser farm was a pre-determined conclusion. The court further finds that the Ziesers have not demonstrated that the Agricultural Credit Act of 1987, was applicable to the committee's December 23, 1987, decision to sell the Zieser farm to the Boddickers. Finally, the court concludes that because it does not have a full administrative record with which to review the basis for the FmHA's decision to sell the Zieser farm, that remand is necessary in order that the committee may set forth its reasons for selecting the Boddickers.

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED, pursuant to 28 U.S.C. Section 636 (b)(1)(B), that:

(1) this matter be remanded to the FmHA so that the Buchanan County FmHA Committee may

make specific findings consistent with this report and recommendation concerning its selection of Mark Boddicker and Pamela Boddicker for the purchase of the Zieser FmHA inventory farm;

(2) the court dismiss those portions of the Plaintiffs' amended complaint which alleges that Defendants' actions in the selection of the Boddickers was pre-determined, or was done in violation of the Agricultural Credit Act of 1987; and

(3) ruling on the issue of whether the FmHA acted in an arbitrary and capricious manner in choosing to sell the farm to the Boddickers will be deferred until such time as the FmHA has completed its findings. The FmHA shall have 90 days in which to make its supplemental findings. Once the FmHA has made its findings, those findings shall be filed with the court. Counsel for the parties shall then have 45 days in which to file written

memorandums with court indicating their current positions in regard to this issue.

IT IS ORDERED that the parties shall have ten (10) days after service of a copy of the report and recommendation to file written objections, pursuant to 28 U.S.C. Section 636(b)(1), unless and extension of time for good cause is obtained. Such extensions will be freely granted. Any objections filed must identify the specific positions of the report and recommendations to which the objections are made, and set forth the basis for such objections. See Fed. R. Civ. P. 72; Thompson v. Nix, 897 F.2d 356, 357 (8th Cir. 1990). In addition, any objections to the report and recommendation must include references to the applicable portion of the record upon which an objection is grounded. Failure to timely file objections may constitute a waiver of a party's right to appeal questions of fact. See Thomas

v. Arn, 474 U.S. 140 (1985); Nix, 897 F.2d at 357.

ENTERED this 30th day of March, 1993.

/s/ Mark W. Bennett
United States Magistrate Judge

Statutes and Regulations

5 USC Section 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent

to suit expressly or impliedly forbids the relief which is sought.

5 USC Section 703

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 USC Section 704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and prov.es that

the action meanwhile is inoperative, for an appeal to superior agency authority.

5 USC Section 705

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 USC Section 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provision, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

7 USC Section 1985(e) (1987)

(1) The Secretary shall to the extent practicable sell or lease farmland administered under this chapter in the following order of priority:

(A) Sale of such farmland to operators (as of the time immediately before such sale) of not larger than family-size farms.

(B) Lease of such farmland to operators (as of the time immediately before such lease is entered into) of not larger than family-size farms.

(2) The Secretary shall not offer for sale or sell any such farmland if the placing of such farmland on the market will have a detrimental effect on the value of farmland in the area.

(3)(A) The Secretary shall consider granting, and may grant, to an operator of not larger than a family-size farm, in conjunction with paragraph (3A), a lease with an option to purchase farmland administered under this chapter.

(B) The Secretary shall issue regulations providing for the leasing of such land, or leasing such land with an option to purchase, on a fair and equitable basis.

(C) In leasing such land, the Secretary shall give special consideration to a previous owner or operator of such land if such owner or operator has financial resources, and farm management skills and experience, that the Secretary determines are sufficient to assure a reasonable prospect of success in the proposed farming operation.

(D) To the extent the Secretary may lease or operate real property under this subsection, the Secretary shall, if the Secretary determines to administer such property through management contracts, offer the contracts on a competitive bid basis, giving preference to persons who will live in, and own and operate qualified small businesses in, the area where the property is located.

(4)(A)(i) The Secretary may sell farmland administered under this chapter through an installment sale or similar device that contains such terms as the Secretary considers

necessary to protect the investment of the Federal Government in such land.

(ii) The Secretary may subsequently sell any contract entered into to carry out clause (i).

(B) The Secretary shall offer such land for sale to operators of not larger than family-size farms at a price that reflects the average annual income that may be reasonably anticipated to be generated from such land.

(C) If two or more qualified operators of not larger than family-size farms desire to purchase, or lease with an option to purchase, such land, the appropriate county committee shall, by majority vote, select the operator who may purchase such land, on such basis as the Secretary may prescribe by regulation.

(5)(A) If the Secretary determines that farmland administered under this chapter is not suitable for sale or lease to an operator of not larger than a family-size farm because such farmland is in a tract or tracts that the Secretary determines to be larger than that necessary for family-size farms, the Secretary shall subdivide such land into tracts suitable for such operator.

(B) The Secretary shall dispose of such subdivided farmland in accordance with this subsection.

(6) If suitable farmland is available for disposition under this subsection, the Secretary shall--

(A) publish an announcement of the availability of such farmland in at least one newspaper that is widely circulated in the county in which the farmland is located; and

(B) post an announcement of the availability of such farmland in a prominent place in the local office of the Farmers Home Administration that serves the county in which the farmland is located.

(7) In the case of farmland administered under this chapter that is highly erodible land (as defined in section 3801 of Title 16), the Secretary may require the use of specified conservation practices on such land as a condition of the sale or lease of such land.

(8) Notwithstanding any other provisions of law, compliance by the Secretary with this subsection shall not cause any acreage allotment, marketing quota, or acreage base assigned to such property to lapse, terminate, be reduced, or otherwise be adversely affected.

28 USC Section 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC Section 1361

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

7 CFR Section 1955.106

Except as provided in Section 1955.109 of this subpart for farm property, CONACT real property which has been declared suitable for sale to eligible applicants will be offered for regular sale to eligible applicants in

accordance with FmHA regulations that apply to the appropriate loan program. Real property will be managed in accordance with provisions of Subpart B of this part until sold under this section or reclassified as surplus and sold under Section 1955.107 of the subpart.

(a) Sale by FmHA. When possible, the sale of suitable CONACT property should be handled by County Supervisors and District Directors. The date Form FmHA 1955-40, "Notice of Real Property for Sale," as posted is the date the property is offered for sale. As a minimum, farm property will be advertised for sale in at least one newspaper that is widely circulated in the county in which the farm is located and either Form FmHA 1955-40 or the "Notice of Sale," Form FmHA 1955-41, will be posted in a prominent place in the County Office. If an eligible applicant is not available locally, the official with responsibility for the property will advise other FmHA District and County Offices in the market area of the availability of the property. When requested by the County Supervisor, State Office Farmer Programs staff will assist in publicizing property for sale by informing other FmHA County, District, and/or State Offices. Maximum publicity should be given to the sale under guidance provided by Section 1955.146 of this subpart and care should be taken to spell out eligibility criteria.

(b) Real Estate Brokers. The State Director may authorize use of real estate brokers to sell property to eligible applicants after determining that the use of brokers will be in the best interest of the Government. Selection and use of brokers will be in accordance with Section 1955.130 of this subpart.

(c) Price. Except for farm property, property will be offered or listed for its

market value, based on the condition of the property at the time it is made available for sale. Farm property will be sold for a price that reflects that average income that may be reasonably anticipated to be generated from farming such property. Therefore, the price will be the capitalization value as determined by an appraisal made in accordance with Subpart A of Part 1809 of this chapter (FmHA Instruction 422.1)

(d) Selection of purchaser. (1) Except for farm property, when more than one acceptable offer is received during business hours on the same day, the order in which they will be considered will be decided by lot. If otherwise acceptable, the contract should be signed and accepted subject to approval of credit. "Back-up" offers will be retained in case the first offer processed cannot be closed.

(2) If two or more eligible operators of not larger than family-size farms wish to purchase a suitable farm, the County Committee will select the operator who in their opinion has the best chance for success based upon an evaluation of their past farm records and proposed farm plans. This operator's offer will be accepted. The reasons explaining the County Committee's selection of the best qualified applicant will be fully documented on Form FmHA 440-2, "County Committee Certification or Recommendation." Some of the factors the committee will consider include but are not limited to:

(i) Liquidity. Consider working capital, each flow, the ratios of current assets to current liabilities and current liabilities to total liabilities.

(ii) Solvency. Consider net worth and the ratio of total liabilities to net worth.

(iii) Profitability. Consider net farm income and the ratio of net farm income to net worth.

(iv) Efficiency. Consider the ratios of cash operating expenses to gross receipts and debt repayment to gross receipts.

(e) Credit Sale Procedure. A credit sale to eligible applicants will be processed as follows:

(1) Form FmHA 1955-45, "Standard Sales Contract-Sale of Real Property By the United States," will be used to document the offer and acceptance for regular FmHA sales.

(2) The County Committee will certify to the applicant's eligibility on Form FmHA 440-2, in accordance with program eligibility requirements when required by the FmHA regulation that applies to the appropriate loan program.

(3) Upon request of the applicant, the interest rate charged by FmHA will be the lower of the interest rates in effect at the time of loan approval or closing. If the applicant does not indicate a choice, the loan will be closed at the rate in effect at the time of the loan approval.

(4) The loan limits for the requested type of assistance are applicable to a credit sale to an eligible applicant.

(5) Title clearance and loan closing for a credit sale and any subsequent loan to be closed simultaneously must be the same as for an initial loan except that:

(i) Form FmHA 1955-49, "Quitclaim Deed," or other form of nonwarranty deed approved by the Office of the General Counsel (OGC) will be used.

(ii) The buyer will pay attorney's fees and title insurance costs, recording fees and other customary fees unless they are included in a subsequent loan. A subsequent loan may

not be made for the primary purpose of paying closing costs and fees.

(6) When the transaction is closed, the responsible FmHA official will prepare and distribute Form FmHA 1955-50, "Advice of Inventory Property Sold," according to the FMI.